

TOWARDS THE ABOLITION OF THE *EXEQUATUR* IN EUROPE: AN OVERVIEW OF THE EC REGULATIONS*

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1. This paper covers the most significant trends in the European judicial cooperation in civil and commercial matters.

The starting or we should say the turning point in this field is the so called process of Communitarisation of private international law, that is the increasing competence of the European Community in this area from the Amsterdam Treaty in 1999 onwards, upon which the European Community can adopt measures in the field of Private International Law.

In particular, according to art. 65 of the Treaty, the EC Council shall adopt measures in the field of judicial cooperation in civil matters having cross-border implications, including *inter alia*:

- a) acts improving the recognition and enforcement of decisions in civil and commercial matters;
- b) acts promoting the compatibility of the rules applicable in the Members States concerning the conflict of laws and of jurisdiction;
- c) acts eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Therefore, the fields covered by this new Community competence are wide and somewhat heterogeneous (recognition of judgments, applicable law, access to justice etc.), even if there are a lot of interplays among them, as it will be shown below, and they all pursue the common objective of developing an area of freedom, security and justice, and eventually the free movement of persons and the proper functioning of the European internal market.

2. I will focus only on the issue of the recognition and enforcement of judgments, with a view to the latest evolution.

The free movement of judgments has been more and more simplified in the last years, as a consequence of the development and of the implementation of the principle of the mutual recognition of decisions in civil and commercial matters.

This principle is indeed the cornerstone of the Community judicial cooperation in these matters. It assumes a mutual trust in the administration of justice in the member States and it implies a progressive equivalence of the decisions rendered in the various member States.

For the common lawyers, this language calls to mind the US “full faith and credit” clause among the “sister States”. Indeed the effects of the European integration are similar and in some cases sometimes deeper than those achieved in US.

In practice, this principle can operate according to different forms or levels.

In the various acts under exam, a clear distinction is made between the recognition of the effects (*res iudicata*) of a decision and the enforceability of the same.

In general terms, by virtue of this principle, judgments given in a Member State should be recognized automatically without the need of any further procedure or decision by a judge, except in case of dispute.

On the contrary, in order to enforce a decision a procedure to obtain a declaration of enforceability (*exequatur*) by the judge of the requested State is in principle needed. They are more or less rapid and efficient and we shall see that in the very recent developments is even abolished (see the third level below).

Following an established Community classification, three levels can be identified:

3. The first level is adopted under the old Brussels Convention (now replaced by the Brussels I Regulation), and it still remains in principle under the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II-bis)

A judgment on the exercise of parental responsibility in respect of children given in a Member State where it is enforceable shall be enforced in another Member State on the application of any interested party (art. 28).

It is useful to remember that such a declaration does not cover all the decisions falling within the scope of the Regulation: on the one hand, it is not required for updating the civil status records of a member State as a consequence of a judgment relating to a divorce because in this case we are not facing an enforcement properly said; on the other hand, specific and more liberal provisions are laid down as to the right of access and the return of child decision (see below).

In any case, the court applied to shall render its decision *inaudita altera parte*, i.e. without the person against whom enforcement is sought, nor the child, being entitled to make any submission (art. 31)

The application may be refused only for one of the grounds on non-enforcement listed by the Regulation itself (arts. 22-23). It follows that at this stage **courts control of its own motion** the judgment and the application can be refused at this stage.

Of course the decision may be appealed against by either party and the appeal shall be dealt in this case according to the rules governing procedure in contradictory matters (art. 33 par.3).

This is a cautious approach – at least if compared with the developments in other fields – due to the need of protection of the national fundamental values in a sensitive field like the family law.

4. The second level works under the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and the Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings (the Insolvency Regulation).

Further simplifications of the exequatur procedure are here introduced.

Always upon application of the interested party, enforceability is declared *inaudita altera parte* (art. 41 Brussels I), immediately after only pure formal checks of the documents supplied (that is on completion of formalities such as mainly the production of an authentic copy of the decision) and - this is the further step - without any review even by the court itself of its own motion of any of the grounds for non enforcement provided for by the Regulation (including public policy!)

Only if the defendant appeals the decision of enforceability, the competent court, following the rules governing procedure in contradictory matters, will examine such grounds of non enforcement and, in case, revoke such a declaration.

It follows that in the absence of an appeal by the party against whom the enforcement is sought, the judgment will circulate among EU member States without any control, and enforced even in case – not very probable indeed – of contrast with the national public policy of the requested State.

The same schema is valid for the Insolvency Regulation, within which decisions judgments opening insolvency proceedings, and a number of other decisions related to the proceedings (art. 25) are subject to the same regime provided for the Brussels I Regulation as to recognition and enforceability, with the only exception of the grounds for non-recognition or enforcement,

that here is limited to the case where the effects of such recognition or enforcement is manifestly contrary to the State's public policy and in particular to its fundamental principles or the constitutional rights and liberties of the individual (art. 26).

It is worth stressing that this step is not only a technical device, but has far-reaching consequences: the judgment rendered by a European judge is in itself a "European" judgment, meaning that in principle it deploys effects in all the European territory. The declaration of enforceability and the relevant Community rules operate for the purpose of favoring such pan-european effects and eventually the right to the enforcement and do not reflect any real sovereign power of control over the foreign judgment.

5. In order to favor as much as possible the recognition and the enforcement of foreign decisions without the Community, all these regulations reduce the grounds of non-enforcement.

Some cornerstones should be highlighted in this regard. Without facing a detailed exam, the common features of the above mentioned Regulations are the following:

- 1) no review by the judge of the requested State over the jurisdiction of the court of origin, save some exceptions (i.e. matter related to insurance, consumer and employment contracts, as well as the so called exclusive jurisdiction under Brussels I). This principle has been constantly repeated and recently confirmed by ECJ with regard to the Insolvency Regulation, where some doubts had arisen (ECJ, 2 May 2006, *Eurofood*).
- 2) no control as to the substance of the foreign judgment.
- 3) a limited number of grounds able to block the recognition and the enforcement, basically referable to:
 - a) contrast with public policy: as ECJ recalled on several occasion the public policy clause is in any case to be interpreted restrictively to the extent it undermines the trust among States. It covers also and especially procedural principles and first of all the right to a due process (see the leading case ECJ, 28 March 2000, *Krombach*).
 - b) conflicts of judgments and in particular that a judgment handed down in the State requested, no matter if earlier or later, will prevail over the foreign one.

6. The third level is represented by the latest acts: Regulations No. 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims, No. 1896/2006 of 12 December 2006 creating a European order for payment procedure, No. 861/2007 of 11 July 2007 establishing a European Small Claims Procedure.

These acts give rise to a complete freedom of circulation of judgment within their respective material scope as they put on the same footing the decisions rendered in a foreign member State and the national ones by means of the complete abolition of any exequatur procedure. From this point of view, the right of the creditor in cross border dispute to enforcement is highly reinforced.

In order to achieve these results, differently from the above mentioned acts, these Regulations partly govern the procedure before the judge of the State of origin destined to result in the final decision.

This can be pursued either by minimum procedural standards or common procedural rules. These techniques are particularly new and revolutionary not only in the European context but I guess in the general panorama of the international cooperation in judicial matters. They deserve special attention.

6 a) The first approach is followed by the European Enforcement Order Regulation, whose scope is limited to uncontested claims. This is indeed a quite controversial definition, as it includes, for example, cases where debtors has never objected to the claim in the course of the court proceedings in compliance with the relevant requirements of applicable municipal laws¹.

We are always dealing here with national judgments qualified by the Regulation as able to circulate freely in all Europe (art. 5). Such a qualification is given by a certification of the court of origin where a preventive control over the judgment is made. In practice, the usual controls through the *exequatur* procedure are shifted to the courts of the State of origin.

In short, judgments related to uncontested claims can be certified as a European Enforcement Order (art. 6) if:

- the judgment is enforceable - not necessarily final – in the State of origin;
- the court proceedings met a number of procedural requirements set out in chapter III (art. 12), mainly concerning the methods of service on the debtor of the document instituting the proceedings, and a due information about the claim. The purpose is clearly to make sure that the failure to contest by the debtor is really aware.
- the judgment does not conflict with some rules on jurisdiction laid down in Brussels I for civil and commercial matters (the exclusive rules and the rules on insurance and employment contracts²).

The effect of such a certification is that the judgment shall be recognized and enforced in the other member States without the need for a declaration of enforceability and without any

possibility of opposing its recognition (art. 5), including the scrutiny of public policy. The result is then the abolition of any *exequatur* procedure, even formally.

A judgment certified as European order shall be enforced under the same conditions as a judgment handed down in the member State of enforcement (art. 20 par. 1).

Enforcement procedures shall be governed by the law of the member State of enforcement apart from some provisions integrating national provisions. Some circumstances are indeed taken into consideration: it is the case of the conflict of judgments that can give rise to the refusal of enforcement (art. 21). This is a well known ground for non-enforcement in the enforceability procedures that cannot be assessed at the moment of the certification stage but is retrieved at the enforcement stage. It is however stricter than the similar ground under Brussels I, to the extent that the refusal is granted only in case of conflicts with earlier judgments given in any member State or in a third country and such conflict was not and could not have been raised as an objection in the court proceedings in the member state of origin.

It is also the case of application for a review before the Court of origin – permitted under exceptional cases under art. 19 - that can authorize stay or limitation of enforcement (art. 23).

The same logic – even if not identical rules - is followed within Brussels II-bis with specific reference to two types of decisions, concerning the return of child and the right of visit (artt. 41,42). Here the sensitive fields and the best interest of the child suggested that the decision of the court of origin is certified and accepted in the other Member States as such.

This model of European Enforcement Order gave indeed rise to a lot of criticism on several grounds. On the one hand, a cut of the right of the debtor to defend himself is reported: the minimum standards are not binding and their existence in a given State may be certified, at the least in the words of the Regulation - by the same judge who rendered the decision! –see art. 6); on the other, the impossibility to raise any public policy objections before the courts of the requested State is highly criticized. It is indeed true that from this point of view the Regulation goes beyond even the effects of the US Full Faith Clause.

In any case, it is important to stress that there is no unification of the national rules on civil procedure. The respect of the minimal standards is a requisite to be met but is not at all imposed upon Member States. If they exist under the laws of the State of origin and are certified, the instrument is available; otherwise, the Regulation is not applicable.

6. b. The unification is pursued only through the adoption of common rules and is achieved by the EC Regulation creating a European order for payment procedure, as well as by the EC Regulation establishing a European Small Claims Procedure.

These acts lay down a number of uniform binding procedural rule applicable in every Member State.

The Regulations cover different aspects, but as common goals they have on the one hand to simplify and speed up the litigation in cross border cases concerning uncontested pecuniary cases as well as small claims litigation; and on the other hand, to let judgments circulate without any intermediate procedure and without control.

To this end, these rules drop the traditional logic of mutual recognition of judgments among States and try to harmonize the civil procedure rules of the member States, even within the limits of cross border cases in the mentioned fields.

As a consequence, judgments rendered upon such uniform procedural rules in a State can easily deploy effects in all the member States and be considered fully equal to the national judgments of the State where they are enforced (respectively art. 19 and art. 20). As a matter of fact, the Order for payment or the Judgment given in a European Small Claim Procedure, once effective in the State of origin, have an intra-Community validity. No procedure and no kind of control are provided for or permitted in the other member States.

The enforcement procedures are still governed by the national laws, and in particular by the law of the State of the enforcement, and the decision shall be enforced under the same conditions as an enforceable decision issued in that member State (art. 21 Regulation on the Order of Payment, art. 21 Regulation on Small Claims Procedure).

However, the Regulations introduce some provisions referring to the refusal, and stay or limitation of enforcement, corresponding to the above mentioned rules contained in the Enforcement Order Regulation. The difference is that here they take the shape of uniform rules, and are applicable both in the State where the Order is adopted, and in any other State. That is to say, we are facing a “raid” of the EC in the enforcement law area.

The binding character of the common rules is indeed a better guarantee for the right of the debtor in comparison with the Enforcement Order Regulation. However, it must be recalled that the European procedures are alternatives to the procedure existing under the laws of member States and therefore such laws are neither replaced nor harmonized.

Apart from the content and the assessment of the relevant procedures, the crucial remark is that these late acts go beyond the achievement of the principle of mutual recognition. The Community goal is here wider and encompasses the access to justice in general terms, irrespective of the need for enforcement abroad of a decision, and at least some aspects of the law of enforcement strictly said.

Here we may expect another step forward and a stronger integration to begin.

Notes

* This paper is the written version of a speech delivered by the author at the 2008 International Law Association Conference, held in Rio de Janeiro (Brasil) on the 18-22 August 2008.

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¹ Art. 3.1 par b. Also art. 3.1 par. c is a delicate rule. It states that “the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the member State of origin”:

² For consumer contracts the same rule (art. 6) states that a judgment can be certified if the judgment was given in the member State of the debtor’s domicile within the meaning of Article 59 of the Brussels I Regulation when the debtor is a consumer.